TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 412.

HONOLULU RAPID TRANSIT & LAND COMPANY, APPELLANT,

vs.

THE TERRITORY OF HAWAII, BY CHARLES R. HEMENWAY, ATTORNEY GENERAL OF THE TERRITORY OF HAWAII.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED MAY 26, 1906.

(21,195.)

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INDEX.

	Original.	Print.
Proceedings in circuit court of the first judicial circuit, Territory of Hawaii	1	1
Bill of complaint	1	1
Temporary injunction	9	6
Answer	10	6
Replication	14	9
Opinion	15	10
Plaintiff's Exhibit G—Map of city of Honolulu	23	14
Decree and writ of injunction	24	15
Sheriff's return	26	16
Notice of appeal	27	16
Bond on appeal	28	17
Opinion	30	18
Findings of fact	48	28
Decree	52	30

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	Original.	Print.
Petition for appeal	53	31
Allowance of appeal	54	31
Acceptance of service of appeal and citation	54	32
Assignment of errors	56	32
Affidavit of value	62	35
Bond on appeal	64	36
Citation	66	37
Order extending time to file record on appeal	68	38
Præcipe for transcript of record	69	38
Clerk's certificate to transcript	73	40

1 [On the margin.]

Let process issue as prayed.
Sept. 7, 1907.
(Sig.) J. T. DE BOLT,
First Judge.

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. At Chambers. In Equity.

TERRITORY OF HAWAII, by CHARLES R. HEMENWAY, Attorney General of the Territory of Hawaii, Plaintiff,
vs.
HONOLULU RAPID TRANSIT AND LAND COMPANY, a Corporation, Respondent.

Injunction.

Bill of Complaint.

To the Honorable J. T. De Bolt, First Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, Presiding at Chambers:

Your orator, the Territory of Hawaii, by Charles R. Hemenway, Attorney General of the Territory of Hawaii, humbly complaining unto Your Honor, respectfully shows and presents:

I.

That Charles R. Hemenway is and ever since the 15th day of August, A. D. 1907, has been the duly appointed, commissioned, qualified and acting Attorney General of the Territory of Hawaii.

II.

That the Honolulu Rapid Transit and Land Company is and during all of the times herein mentioned has been a corporation duly organized and existing under and by virtue of Acts 69 and 70 of the Session Laws of the Republic of Hawaii of the year A. D.
2 1898, now compiled in and in the Revised Laws of Hawaii appearing as Chapter 66 thereof.

III.

That the said respondent is maintaining and operating and during all the times herein mentioned has maintained and operated a single track electric railway with curves, switches, turnouts, overhead wires and other appliances necessary for the maintenance and operation of a such and said electric railway upon the following streets, roads and places in the District of Honolulu, Island and County of Oahu, Territory of Hawaii, that is to say:

Beginning at the intersection of Liliha and Wylie streets, thence along Liliha street, to King street, thence along King to a point thereon upon or near the Nuuanu stream, whence, by a direct or nearly direct line Hotel street may be entered, then into and along Hotel street to Alapai street, thence along Alapai street to Beretania street, thence along Beretania street to the Waialae road, and thence along the Waialae road to the intersection of Waialae road and Koko Head Avenue, all of which together will be hereinafter referred to as the "Liliha-Waialae Line," beginning again at the junction of the road leading around Diamond Head and the Kapiolani Park, thence through said park on a line parallel with the makai or Westerly street thereof and mauka of said street on a line designated and approved by the Honolulu Park Commission, to the Waikiki road, at or near Makee Island, thence along the mauka side of the Waikiki road to McCully street, thence along McCully street to King street, and thence along King street Westerly to Kahauiki, all of which together will be hereinafter referred to as the "King Street Line;" beginning again at the intersection of Allen and Fort streets, along Fort street to Beretania street, thence along Beretania street to Alapai
3 street, thence along Alapai street crossing Kinau street to Lunalilo street, thence along Lunalilo street to Pensacola street, thence along Pensacola street to Wilder avenue, thence along Wilder avenue to Alexander street, thence along Alexander street to King street, all of which together will be hereinafter referred to as the "Punahou Line;" beginning again at the intersection of King and Fort streets, thence along Fort street to Beretania street, over the same tracks as heretofore spoken of on said Fort street as a part of the Punahou line, thence along Beretania street to Nuuanu street, and thence along Nuuanu street to a point South of Wylie street and about opposite the Mausoleum; all of which together will be hereinafter referred to as the "Nuuanu Street Line;" beginning again at the intersection of Wilder avenue and Punahou street, thence along Punahou street to the Manoa Road, thence along the Manoa Road to Kamehameha avenue, and thence along Kamehameha avenue to its end, all of which together will be hereinafter referred to as the "Manoa Line;" beginning again at the junction of Allen and Punchbowl streets, thence along Allen street to Alakea street, thence along Alakea street to Beretania street, all of which together will be hereinafter referred to as the "Alakea Street Line;" beginning again at the intersection of Beretania and Emma streets, thence along Emma street to Punchbowl street, thence along Punchbowl street to the Pauoa Road, all of which together will be hereinafter referred to as the "Emma Street Line."

IV.

That the "Liliha-Waialae" line connects with the "King Street" line at the corner of Liliha and King streets and the corner of Alexander and King streets; with the "Punahou" line and the "Nuuanu Street" line at the corner of Fort and Hotel streets; that the "Punahou" line is a connecting line with the "King Street" line at the

corner of King and Fort streets and the corner of King and
4 Alexander streets; with the "Nuuanu Street" line at the corner of Beretania and Fort streets; with the "Alakea Street" line and the "Emma Street" line at Emma and Beretania streets, and with the "Manoa" line at the corner of Pensacola street and Wilder avenue; that the "Alakea Street" line connects with the "King Street" line at King and Alakea streets.

That the "Punahou," "Nuuanu Street," "King Street," "Alakea Street" and "Emma Street" lines are, and that portion of the "Liliha-Waialae" line between Wylie and River streets is operated by the respondent company on a ten minute schedule, that is to say, cars travel both ways at intervals of ten minutes, and the respective lines are so arranged by said company that cars of connecting lines meet simultaneously or nearly simultaneously at transfer points.

V.

That that portion of Liliha street over which the respondent company operates its cars is of about two miles in length and runs through a densely populated portion of the District of Honolulu. That the residents along the line of Liliha street and immediately adjacent thereto, aggregating about six thousand, resort to and use the cars operated over and along said Liliha street by said respondent company for the purpose of transportation along said Liliha street and other streets within the District of Honolulu, over which the connecting lines of the respondent company operate. That the residents of the District of Honolulu generally resort to and use the connecting lines as well as the Liliha street cars operated by the respondent company, to reach points along the line of said Liliha street and immediately adjacent thereto. That the convenience of the public requires that a ten minute schedule, as hereinbefore explained
5 and as now maintained by said respondent company, continue in respect to the cars of said company operated over said Liliha street. Your orator is informed and believes, and upon such information and belief alleges it to be the fact, that the said respondent company in violation of the rights of the public and its duties under the law and the requirements of its charter, threatens and proposes to forthwith modify the schedule of the said "Liliha-Waialae" to the end that the said cars so operated over and along said Liliha street between the hours of nine o'clock in the morning and four o'clock in the afternoon and between the hours of six o'clock in the afternoon and twelve o'clock midnight will operate under a twenty minute schedule, that is to say, cars on said Liliha street will travel both ways at intervals of twenty minutes, and the said respondent company threatens and proposes to forthwith, during the said times, operate its cars over and along Liliha street at intervals both ways of twenty minutes. That for the purposes of reasonably prompt transportation facilities in the pursuit of business or pleasure, the making of reasonably prompt transfers to connecting lines, the prevention of unnecessary delay in traveling over Liliha street in respect to the distance to be traveled, and for the prompt and rapid attention to business, the public convenience requires that at all times there be main-

tained on the "Liliha-Waialae" line, a ten minute schedule in respect to Liliha street, and that cars running over and along Liliha street proceed both ways at intervals of not more than ten minutes; that unless the respondent company is prevented by injunction, it will proceed forthwith to install and inaugurate the said modified schedule and operate its cars over and along Liliha street both ways at intervals of more than ten minutes, and will prevent thereby reasonably prompt transportation facilities over Liliha street, cause un-
6 necessary delay at the transfer points of the "Liliha-Waialae" line with the connecting lines, unreasonably obstruct and retard the transaction of business and the pursuit of pleasure, and render the cars so operated by it along said Liliha street useless to the public as a means of transportation, all of which is to the detriment and irreparable injury of the public, and contrary to its rights in that behalf.

VI.

That the aforesaid lines operated by the respondent company are the only public transportation facilities within the District of Honolulu.

VII.

That C. B. High, John C. Lane, N. E. Gedge, J. O. Young and L. L. McCandless are citizens of the United States and of the Territory of Hawaii, and resident within the District of Honolulu along a line of and immediately adjacent to said Liliha street. That heretofore, and on to wit, the 7th day of September, A. D. 1907, they did both individually and representing the residents along the line of and immediately adjacent to said Liliha street complain to the Attorney General of the Territory of Hawaii and present to him that the convenience of the public generally and the said residents in reference to said Liliha street in particular, required a ten minute service upon and along said Liliha street, and that a service of a greater interval of time than ten minutes between cars would be a serious inconvenience to the said residents in respect to Liliha street and the public generally and would prevent reasonably prompt transportation facilities, cause unnecessary delay at the transfer point of the "Liliha-Waialae" line with the connecting lines, unreasonably obstruct and retard the transaction of business and the pursuit of pleasure and render the cars of the said respondent com-
7 pany useless to the public as a means of transportation going to and from Liliha street.

VIII.

That your orator is without remedy at law in the premises by the strict rules of the common law and is only relievable in the court of equity where matters of this kind are properly cognizable and relievable.

Wherefore, your orator prays that a temporary injunction issue herein by Your Honor forthwith directing, commanding, enjoining

and restraining the respondent, the Honolulu Rapid Transit & Land Company, its agents, servants, employees and attorneys from operating its cars over and along Liliha street, both or either way, at intervals of more than ten minutes or *and* twenty minutes.

Your orator further prays that process of this court may issue commanding the respondent herein to appear and answer this Bill as is usual in said proceedings and in accordance with law, and that your orator may have such other and further relief in the premises as the nature of the circumstances of this case may require and to Your Honor may appear meet and proper. And your orator further prays upon the hearing hereof that a permanent injunction issue directing, commanding, *re*joining and restraining the said respondent, the Honolulu Rapid Transit & Land Company, its servants, agents, employees and attorneys from operating its cars over and along Liliha street, both or either way, at intervals of more than ten minutes or *and* twenty minutes, and your orator will ever pray.

TERRITORY OF HAWAII,
(Sig.) By CHARLES R. HEMENWAY,
Attorney General.

(Sig.) E. C. PETERS,
Of Counsel.

8 ISLAND OF OAHU, *Territory of Hawaii:*

Charles R. Hemenway, being first duly sworn deposes and says: That he is and ever since the 15th day of August, A. D. 1907 has been, the duly appointed, commissioned, qualified and acting Attorney General of the Territory of Hawaii; that he has read the foregoing Bill of Complaint and knows the contents thereof; that the matters and things therein alleged are true except as to those matters therein alleged upon information and belief, and as to those matters so alleged upon information and belief, he believes them to be true.

(Sig.) CHARLES R. HEMENWAY.

Subscribed and sworn to before me this 7th day of September, A. D. 1907.

(Sig.) WADE WARREN THAYER,
[SEAL.] *Notary Public, First Judicial Circuit, Territory of Hawaii.*

9 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. At Chambers. In Equity.

TERRITORY OF HAWAII, by CHARLES R. HEMENWAY, Attorney General of the Territory of Hawaii, Plaintiff,
vs.
HONOLULU RAPID TRANSIT AND LAND COMPANY, a Corporation, Respondent.

Injunction.

Temporary Injunction.

The Territory of Hawaii to the Honolulu Rapid Transit & Land Company, a corporation, Greeting:

In accordance with the prayer contained in the Bill of Complaint this day filed in the above entitled court and cause, a copy of which said Bill will be served upon you herewith, and to the allegations whereof you, and each of you, are specially referred:

You, the Honolulu Rapid Transit and Land Company, a corporation, are hereby strictly commanded to forthwith desist and refrain and hereafter until the further order of this court at chambers in equity desist and refrain from operating the cars of your company over and along Liliha street within the District of Honolulu, County of Oahu, both or either way at intervals of more than ten minutes or *and* twenty minutes.

Hereof fail not at your peril.

Done at Chambers this 7th day of September, A. D. 1907.

(Sig.) J. T. DE BOLT,
First Judge of the First Judicial Circuit.

10 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. At Chambers. In Equity.

TERRITORY OF HAWAII, by CHARLES R. HEMENWAY, Attorney General of the Territory of Hawaii, Plaintiff,
vs.
HONOLULU RAPID TRANSIT AND LAND COMPANY, a Corporation, Respondent.

Injunction.

Answer of Respondent, Honolulu Rapid Transit and Land Co.

This respondent, the Honolulu Rapid Transit and Land Company, now and at all times *herein*, saving to itself — and all manner of benefit or exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in said petition contained, for answer thereto, or to so much thereof as is material or necessary for it to make answer to, answering, says:

I.

That this court has no jurisdiction of the subject matter of said action.

II.

That the allegations in said Bill of Complaint set forth no ground or cause of complaint against this defendant or ground for relief by injunction or otherwise, or any cause for the exercise of the jurisdiction of this court.

III.

That it is not shown by the allegations of said bill or otherwise that the Territory of Hawaii has authorized the institution of said action, or is a property party to said proceeding.

11

IV.

This defendant admits paragraph 1.

Admits paragraph 2, excepting that it alleges that it is also incorporated and existing and derives its right under and by virtue of the Organic Act of this Territory and the approval of the President of the United States given in pursuance of said Organic Act by William McKinley, President of the United States, on the 25th day of June, A. D. 1900, and it alleges that its franchise and rights are granted both by said laws of the Republic and of said Act of Congress of the United States.

Admits paragraph 3 and paragraph 4, excepting so much of the same as alleges that the respective lines are so arranged by said Company that cars of connecting lines meet simultaneously or nearly simultaneously at transfer points, which it denies; but it admits that in many cases schedules are so arranged that cars of connecting lines meet simultaneously or nearly simultaneously at transfer points; and denies that that portion of Liliha street over which the respondent Company operates its cars is about two (2) miles in length and runs through a densely populated portion of a district of Honolulu, and says that the length of that portion of Liliha street is 7101 feet.

It has no information sufficient to state with exactness the number of residents along said line immediately adjacent thereto; but it denies that they aggregate about six (6) thousand, or any number approximating that amount.

Denies that the convenience of the public requires a ten-minute schedule or that the schedule set out in said clause will prevent reasonably prompt transportation facilities from Liliha street, or cause unnecessary delay at the transfer points of the Liliha-Waialae line with connecting roads, or unreasonably obstruct and retard the transaction of business, the pursuit of pleasure or render the cars so operated along Liliha street useless to the public as a means of transportation, or that it will be a detriment and irreparable injury to the public or contrary to the rights of the public, or that the maintenance of said ten-minute schedule is necessary for the purpose of reasonably prompt transportation facilities in the pursuit of business or pleasure or the making of reasonably prompt transfers

12

to connecting lines or the prevention of necessary delay in operating over Liliha street in respect to the distance to be traveled for the prompt and rapid attention to business or public convenience.

Denies paragraph 6, but admits that the Honolulu Rapid Transit and Land Company is the only street railway system within said district; is unable to answer paragraph 7 in full.

Admits that the persons alleged are citizens and resident within the district of Honolulu, but denies that they represent the residents along the line of said Liliha street particularly if said L. L. McCandless made any such representation as is there alleged.

And this respondent says that, in the endeavor to improve the service on the said Liliha-Waialae line, it purposed to make said service a continuous fifteen-minute service from Waialae through to Liliha street, but that after a conference between the officials of said respondent and Messrs. George R. Carter, F. T. P. Waterhouse and L. L. McCandless, representing the patrons along the Liliha street end of the line, and Messrs. E. A. Berndt, W. L. Howard and W. M. Minton, representing the Waialae portion of said route, and after a thorough canvass of the situation and a discussion of all the
13 facts in regard to the necessities of travel at each end and the convenience of the general public, it was unanimously agreed, and at the unanimous recommendation of said committees this respondent consented, to change its plan and to modify the schedule of said Liliha-Waialae line substantially as alleged in the Bill of Complaint, and was proceeding to carry said change into execution at the time of the service of this injunction, and that said proposed service is all that the exigencies of the travel along said line and the accom-odation of the patrons of the road demand, with a view to the economical operation of said system, and is an ample service under all the conditions.

Wherefore, this respondent prays that said bill may be dismissed and the injunction herein issued be dissolved.

HONOLULU RAPID TRANSIT AND LAND COMPANY,
By CASTLE & WITHINGTON,
Its Attorneys.

ISLAND OF OAHU, *Territory of Hawaii, ss:*

C. G. Ballentyne, being first duly sworn, deposes and says: That he is the Manager of the Honolulu Rapid Transit and Land Company, respondent herein; that he has read the foregoing answer and knows the contents thereof, and the matters and things therein stated are true, except as to those matters so alleged on information and belief, and as to those matters he believes it to be true.

(Sg.) C. G. BALLENTYNE.

Subscribed and sworn to before me this 17th day of September, A. D. 1907.

[SEAL.] P. L. WEAVER,
Notary Public, 1st Judicial Circuit,
Territory of Hawaii.

Endorsed: Equity No. 1588. Reg. 1/328. Circuit Court First Circuit, Territory of Hawaii. At Chambers. Territory of Hawaii, Plaintiff *vs.* Honolulu Rapid Transit and Land Co. Answer of Respondent Honolulu Rapid Transit and Land Co. Filed Sept. 17th, 1907, at 11:35 o'clock A. M. L. P. Scott, Clerk. Castle & Withington attorneys for Respondent.

14 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. At Chambers. In Equity.

TERRITORY OF HAWAII, by CHARLES R. HEMENWAY, Attorney General of the Territory of Hawaii, Plaintiff,

vs.

HONOLULU RAPID TRANSIT AND LAND COMPANY, a Corporation, Respondent.

Injunction.

Replication.

This repliant, saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said respondent is uncertain, untrue, and insufficient to be replied unto by this repliant; without this that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied is true; all of which matters and things this repliant is and will be ready to aver and prove as this Honorable Court shall direct, and humbly prays as in and by its said bill it hath hereunto prayed.

(Sig.) E. C. PETERS.
Of Counsel for Complainant.

Dated this 2nd day of October, A. D. 1907.

Endorsed: Eq. 1588. Reg. 1/328. Circuit Court First Circuit. Territory of Hawaii, Plaintiff *vs.* Honolulu Rapid Transit & Land Company, Respondent. Replication. Filed October 3rd, 1907. 11:2 P. M. Job Batchelor, Clerk. E. C. Peters of Counsel.

15 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. At Chambers. In Equity.

TERRITORY OF HAWAII, by CHARLES R. HEMENWAY, Attorney General of the Territory of Hawaii, Plaintiff,
vs.
HONOLULU RAPID TRANSIT & LAND COMPANY, a Corporation, Respondent.

Injunction.

Opinion.

By Act 69, Laws of 1898, (R. L. Ch. 66), respondent was granted the right to construct, maintain and operate a railway along and upon certain streets, roads and places in the district of Honolulu. This franchise carries with it valuable and profitable rights and privileges to be utilized and enjoyed by the respondent. And, in consideration of this franchise and the right to exercise and enjoy the prerogatives incident thereto, the respondent, among other duties imposed upon and assumed by it, is the chief essential duty, namely: "that respondent shall at all times maintain a sufficient number of cars to be used upon said railway for the carriage of passengers as public convenience may require." (R. L. § 841.)

Among the several lines of said railway now in operation, is the "Liliha-Waialae" line, extending from Wyllie street along Liliha, King, Hotel, Alapai, Beretania, Alexander and King streets
16 to the Waialae road, and thence along the Waialae Road to 13th avenue in Kaimuki.

From the inception of the operation of its railway, about 1901, respondent has continuously operated its cars on Liliha street on a ten-minute schedule. During this time the population adjacent to and the passenger traffic of the respondent on Liliha street has grown. And, as shown by the uncontradicted evidence herein the public convenience requires that this ten-minute schedule on Liliha street be maintained.

It also appears that the operation of the railway, as a whole, is profitable. But respondent contends that the Liliha street portion is operated at a loss. I cannot say from the evidence that such is or is not the case. However, as I view the matter, it is unnecessary for the purposes of this case to determine whether this particular portion of the line is profitable or not so long as it is admitted that railway as a whole is profitable.

Notwithstanding the foregoing facts, it appears that the respondent proposes to and will, unless restrained by injunction, proceed to modify the schedule on Liliha street so that the cars running thereon, between 9 a. m. and 4 p. m. and between 6 p. m. and midnight, will be operated on a twenty-minute schedule; the ten-minute schedule to be maintained only from 6 a. m. to 9 a. m. and from 4 p. m. to 6 p. m.

Hence, on September 7, 1907, the Attorney General on behalf of the Territory, filed herein a bill in equity against the respondent, praying that an injunction issue restraining respondent from operating its cars on that portion of the "Liiha-Waialae" line between Wyllie and River streets at intervals of more than ten minutes between cars.

The respondent answered, denying the power and jurisdiction of the court, and alleging that the bill set forth no ground of
17 complaint; also, that it is not shown that the Territory has authorized this suit, or is a proper party, and also contending that mandamus and not injunction is the proper remedy.

The question thus presented for consideration is, Has the court power under the law, pleadings and evidence to enjoin the respondent as prayed for? In my opinion this question must be answered in the affirmative.

It appears to me that the facts herein resolve themselves into two simple questions, namely, What does section 841 mean and is it forceable? It will be observed that this statute is mandatory and not permissive.

That the franchise granted and accepted is a contract, there can be no question. And it is a principle of law as well as of natural justice, that he who claims the benefits of a mutual contract or other like undertaking, must also bear the corresponding burdens incident thereto.

The court has no more power to eliminate this section, which is a part of the franchise, than it has to interpolate other provisions therein; and surely, this section was inserted for a purpose, which is to be ascertained from the language used and the context, as well as from the purpose of the act. The language used is plain, and it would seem that the Legislature has accordingly, clearly and beyond question expressed its intention.

Booth on Street Railways, Sec. 8, says:

"Both on reason and authority, a charter lawfully granted and duly accepted and acted upon, has all the elements of a contract and is binding upon all the parties to it, and enforceable, if not always in the same manner yet to the same extent, as an ordinary agreement between natural persons. From the Dartmouth College case
18 to the present time this has been the American doctrine. In nearly all charters, while many of the terms and conditions are expressed, others are implied."

The same authority at Sec. 234, relative to requiring cars to be run during certain hours and at fixed intervals, says: "Regulations respecting the frequency of trips, and the hours during which the railway shall be operated, are clearly proper subjects of local legislation; or of contract between the public corporation and the private company. Duties of this character, when lawfully imposed or assumed, may be enforced by appropriate remedies. Courts may grant relief for the failure to discharge an obligation of this kind, even though the hours and intervals are not fixed, and the duty to furnish proper railway service is expressed in general terms only, as, for instance, the running of cars along a particular street daily, 'at such regular intervals as may be right and proper'."

The distinction between an ordinary railroad and a street railway is important, and a clear mental grasp of this distinction will assist materially in determining their respective duties and obligations to the public.

The former, being incorporated for private gain and having the right to exercise the power of eminent domain only, is not so burdensome upon the public; consequently, its obligations to the public are correspondingly less; while, on the other hand, the street railway, being organized chiefly to subserve the public convenience and not only enjoying the power of eminent domain but also the right to a public franchise, whereby it may encumber the public streets and highways, and otherwise become a burden and danger to the public, its duties to the public therefore, must, accordingly correspond with its greater rights and powers. And, when we add to this, the distinction between permissive and mandatory statutes the con-
19 clusion to be reached would seem to be clear. The franchise was granted to respondent not for its profit alone or that of its stockholders, but in a large measure for the public benefit.

"Peculiar privileges were conferred upon it in consideration that it would provide facilities for communication and intercourse for the public."

State *ex rel. v.* Spokane St. Ry. 41 L. R. A. 515.
Messenger *v.* Penn. Ry. Co., 36 N. J. L. 407.

It cannot fail of observation that the chief consideration exacted by the public for the numerous rights, powers and privileges conferred upon and to be enjoyed by the respondent under its franchise, was and is the public convenience and service to be rendered by respondent. What the public convenience in this respect may require is to be determined by the public rather than by respondent. To hold otherwise would necessarily result in a total disregard and annulment of the plain language of Section 841.

The requirements of the public convenience, as I view it, does not lie solely in the discretion of the respondent or its directors. And, in this connection, if by any possibility a doubt as to the construction of Section 841 should be perceived, it will be observed that "words and phrases in statutes conferring franchises on corporations must receive that interpretation which is most favorable to the public.

Booth, *supra* Sec. 33.
C. T. Co. *vs* Pullman Car Co., 139 U. S. 49.
R. T. Co. *v.* Tram Co., 13 Haw. 371.

In the case at bar the evidence conclusively shows that the public convenience requires the continuation of the ten-minute schedule. The court can come to no other conclusion as to that. The respondent by its failure to contest this point thereby admits it.

It is urged on behalf of respondent that the Liliha street
20 end of the "Liliha-Waialae" line is unprofitable and for that reason the public is without a remedy. This contention to my mind is unsound, inasmuch as the railway as a whole is admitted to be profitable.

State *v.* B. & M. T. Co. 45 L. E. A. 847.
Mayor *v.* D. D. R. Co., 133 N. Y. 104.
People *v.* R. R. Co. 35 L. R. A. 656.

It is also urged that mandamus is the appropriate remedy and not injunction.

High on extraordinary remedies, at §6, clearly defines these remedies and points out their distinguishing features as follows: "It is only when we come to consider the subject and purpose of the two writs that the most striking points of divergence are presented. An injunction is essentially a preventive remedy, mandamus a remedial one. The former is usually employed to prevent future injury, the latter to redress past grievances. The functions of an injunction are to restrain motion and to enforce inaction, those of a mandamus to set in motion and compel action. In this sense an injunction may be regarded as a conservative remedy, mandamus an active one. The former preserves matters *in statu quo*, while the very object of the latter is to change the status of affairs and to substitute action for inactivity. The one is, therefore, a positive or remedial process, the other a negative or preventive one. And since mandamus is in no sense a preventive remedy, it can not take the place of an injunction, and will not be employed to restrain or prevent an improper interference with the rights of relators."

Injunction is the appropriate remedy to prevent a proposed change in the time schedule of a street railway, for this would be injurious to the public, if the intervals between cars were extended, while mandamus would be the remedy to restore or change the schedule
21 to conform to the public convenience. To illustrate: the Liliha street people desire to prevent a change in the schedule on their end of the line, hence, the use of the writ of injunction. The Kaimuki people, however, desire a change from a twenty-minute schedule to a ten-minute schedule. Is not mandamus their remedy?

Regarding the public convenience as to the general use of the cars in Honolulu, it is significant to observe that with a ten-minute schedule on a part of the railway system and a twenty-minute schedule on other parts thereof reduces the whole system to a twenty-minute service to a person in any part of the city, who, in the first instance, takes passage on a line although it is operated on a ten-minute schedule and who is obliged to pass over a line with only a twenty-minute schedule to reach his destination. Thus are not only the people residing on a line with a twenty-minute schedule inconvenienced, but the entire population of Honolulu, some 40,000 people, to say nothing of strangers and outsiders, obliged to consider this difference in schedules and act accordingly. Public convenience, in my opinion, clearly requires that all lines be operated upon a uniform schedule, and that a passenger may thus be able to reach his destination in any part of the city without delay.

Respondent also urges that the statute does not prescribe any specific duty on its part to be performed. It will be observed, however, that the statute specifically and clearly directs that the respondent "shall at all times maintain a sufficient number of cars to be used upon said railway for the carriage of passengers as public convenience may require."

It has already been pointed out that the evidence clearly and conclusively shows that this requirement can only be complied with by

a continuance of the ten-minute schedule. This surely, if anything further is required, renders the statute specific and certain beyond question.

22 It is a familiar rule that, that is certain which is capable of being made certain. Hence, from either point of view, the statute is specific and certain and enforceable. It is also my opinion that the Territory is a proper party to these proceedings. The franchise was granted by the Legislature representing the public.

In this suit it appears that it is the rights of the public that are about to be injured and require protection, and not those of private individuals.

I am therefore clearly of the opinion that the courts have power to enforce this statute either by preventing or enforcing the operation of the cars as to the time schedule according as the public convenience may clearly and reasonably require.

Hence, a permanent injunction should issue herein enjoining and restraining the respondent from operating its cars over and along Liliha street at intervals of more than ten minutes between cars.

Therefore, the prayer of the bill is granted. Decree accordingly.

J. T. DE BOLT,
First Judge.

C. R. HEMENWAY,
Att'y Gen'l, and
E. C. PETERS,
Of Counsel for the Territory.
CASTLE & WITHINGTON,
For Respondents.

Dated Oct. 17th, 1907.

Endorsed: Eq. 1588. Reg. 1/328. Circuit Court First Circuit Territory of Hawaii. Territory of Hawaii by C. R. Hemenway, Attorney General of the Territory of Hawaii, Plaintiff *vs.* Honolulu Rapid Transit and Land Company, a corporation, Respondent. Injunction. Opinion. Filed at 12:30 P. M. October 17, 1907. Henry Smith, Clerk Jud. Dept.

(Here follows map, marked p. 23.)